



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

**Su and Minister for Immigration, Citizenship and Multicultural Affairs
(Citizenship) [2023] AATA 3919 (9 November 2023)**

Division: GENERAL DIVISION

File Number: **2023/0572**

Re: **Enji (Hope) Su**

APPLICANT

And **Minister for Immigration, Citizenship and Multicultural Affairs**

RESPONDENT

DECISION

Tribunal: **Dr L Bygrave, Member**

Date: **9 November 2023**

Date of written reasons: **28 November 2023**

Place: **Melbourne**

The Tribunal:

sets aside the decision of the delegate of the Respondent made on 5 January 2023 to refuse Ms Enji (Hope) Su's application for Australian citizenship; and remits the matter to the Respondent for reconsideration in accordance with the direction that Ms Enji (Hope) Su's parent, Ms Alexandra Jagelman, was an Australian citizen at the time of her birth.

..[sgn].....

Dr L Bygrave, Member

CATCHWORDS

CITIZENSHIP BY DESCENT – whether parent of Applicant was Australian citizen at the time of the birth – definition of ‘time of the birth’ – whether claimed parent-child relationship existed at or before time of the birth – whether ‘time of the birth’ should be given technical or ordinary meaning – decision set aside and remitted.

LEGISLATION

Australian Citizenship Act 2007 (Cth)

CASES

H v Minister for Immigration and Citizenship [2010] FCAFC 119

Koka v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 82

Enli Su and the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 590

Enci Su and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Citizenship) [2021] AATA 912

SECONDARY MATERIALS

Australian Citizenship [Policy Statement] (27 November 2020)

Citizenship Procedural Instructions 21 – Australian Citizenship by Descent

Citizenship Procedural Instructions 23 – Determining Parent-Child Relationship for the Purpose of the Citizenship Act

REASONS FOR DECISION

Dr L Bygrave, Member

9 November 2023

1. This decision and my reasons for the decision were delivered orally at the conclusion of the hearing of this matter on 9 November 2023. In accordance with a request made by the Respondent on 13 November 2023, the following paragraphs set out my decision in writing.

INTRODUCTION

2. The Applicant, Ms Enji (Hope) Su, was born on [redacted – birth date] in China. Ms Su was abandoned by her biological parents when she was born at [redacted – name of hospital] public hospital with ‘neonatal intracranial haemorrhage and neonatal hypoxic-ischaemic encephalopathy’¹ and she has since been raised by Ms Alexandra Jagelman, an Australian citizen.
3. On 28 March 2022, Ms Su applied for Australian citizenship by descent in accordance with section 16 of the *Australian Citizenship Act 2007* (Cth) (the Act). This application was refused by a delegate of the Respondent on 5 January 2023 on the basis that Ms Su did not satisfy paragraph 16(2)(a) of the Act.
4. Ms Su subsequently applied to the General Division of the Administrative Appeals Tribunal (the Tribunal) for review and her application was heard by videoconference. Both Ms Su and the Respondent were represented at the hearing by counsel.
5. For transparency and context, Ms Su is the sister of Mr Enli (Silas) Su and Mr Enci (Josiah) Su, both of whom had their applications for Australian citizenship by descent considered by the Tribunal respectively in 2020 and 2021. (Regarding these applications, I note that the Tribunal decided Mr Enli (Silas) Su and Mr Enci (Josiah) Su met the provision in paragraph 16(2)(a) of the Act and the Minister did not appeal these decisions to the Federal Court). As the parties are aware, I heard and decided the matter of Mr Enci (Josiah) Su in 2021.² In hearing Ms Su’s application, however, I distinguish the facts of Ms Su and have regard to submissions in relation to further case law.

¹Exhibit T-T3, 160.

² Prior to the hearing, the parties were advised in writing that I was constituted to hear Ms Su’s application and requested to notify the Tribunal if there were any issues. Neither party raised any objections.

RELEVANT LEGISLATION

6. Subsection 16(1) of the Act provides that a person may make an application to the Minister to become an Australian citizen. Pursuant to subsection 17(1) of the Act:

If a person makes an application under section 16, the Minister must, in writing, approve or refuse to approve the person becoming an Australian citizen.

7. Relevant to this matter, subsection 16(2) of the Act states:

(2) A person born outside Australia on or after 26 January 1949 is eligible to become an Australian citizen if:

*a parent of the person was an Australian citizen at the time of the birth;
and ...*

Australian Citizenship [Policy Statement]

8. The *Australian Citizenship [Policy Statement] (Policy Statement)* outlines the overarching legislative requirements for the process of becoming an Australian citizen. The *Policy Statement* also provides context for the relevant Citizenship Procedural Instructions (CPIs) (set out below) when making decisions under the Act.
9. Relevant to this matter are *CPI 21 – Australian Citizenship by Descent* (CPI 21) and *CPI 23 – Determining Parent-Child Relationship for the Purpose of the Citizenship Act* (CPI 23).

CPI 21 – Australian Citizenship by Descent

10. CPI 21 identifies the legal requirements, and related policy and procedures relevant to the consideration of Australian citizenship by descent. This includes establishing whether a parent met the legal requirements at the time of the child's birth.

CPI 23 – Determining Parent-Child Relationship for the Purpose of the Citizenship Act

11. CPI 23 sets out the legal requirements, and related policy and procedures that apply to the assessment of a parent-child relationship as part of an application for Australian citizenship under the Act.

12. The meaning of 'parent' is not defined in the Act. However, CPI 23 provides the following guidance:

*Up until 2010, citizenship by descent was limited under the Act to biological children. Following the decision of the Full Federal Court (FFC) in H v Minister for Immigration and Citizenship[2010] FCAFC 119 (H case) on 15 September 2010, **citizenship by descent can also be accessed by non-biological children in circumstances where a parent-child relationship existed at the time of the child's birth.** Therefore, the term 'parent' where used elsewhere in the Act including citizenship by birth, also includes non-biological parentage.*

*Consistent with the H case, **the determination of whether a person is a parent is a question of fact and should be made on a case-by-case basis, in consideration of all the relevant information in the circumstances, including biological, legal, and social factors.***³

[emphasis added]

13. CPI 23 also sets out the evidence required to show the claimed parent-child relationship existed at the time of the applicant's birth:

For citizenship by birth or descent, the parent-child relationship must have existed at the time of the applicant's birth.

The applicant or their responsible parent should be requested to provide evidence of the length and nature of the claimed parent's parental relationship with the child.

It is unlikely that any one piece of evidence would be sufficient to prove the required parent-child relationship. The decision maker is required to weigh up any relevant factors, including social and legal, to reach a finding of fact as to whether or not the claimed parent is (was) a parent of the applicant at the relevant time.

Evidence that a claimed parent-child relationship existed at the time of a child's birth may include, but is not limited to:

- *evidence that the claimed parents were in a genuine and continuing relationship prior to and at the time of the child's birth;*
- ***evidence that the claimed Australian citizen or permanent resident parent was involved in providing care for the unborn child and/or the mother during the pregnancy, for example, emotional, domestic or financial support, making arrangements for the birth, antenatal and postnatal care;***
- ***evidence that the child was acknowledged socially at or before birth as the claimed Australian citizen or permanent resident parent's child; and***
- *when a child is born through a surrogacy arrangement - a formal surrogacy agreement entered into before the child was conceived and, if available, lawful transfer of parentage prior to or after the birth.*

Evidence that the claimed Australian citizen or permanent resident parent treated the child as their own from some point in time after the child's birth is not evidence that they were the child's parent at time of birth. However, evidence as to the claimed parent's conduct after the birth may be relevant

³ CPI 23 –Determining Parent-Child Relationship for the Purpose of the Citizenship Act, 24 May 2019, part 3.2.

as confirming that parentage at the time of birth. For example, evidence that a person acknowledged the applicant as their own before and at the time of birth and, thereafter, treated the applicant as his own, may justify a finding that that person was a parent of the applicant within the ordinary meaning of the word 'parent' at the time of the birth.

*In the absence of evidence of biological parentage, any other evidence provided should be thoroughly assessed.*⁴

[emphasis added]

EVIDENCE

14. The documentary evidence before the Tribunal set out below is not in dispute and includes the following facts.
15. Ms Su was born on [redacted – birth date] at [redacted – name of hospital] public hospital by emergency caesarean section. Ms Su's birth followed a protracted and obstructed three-day labour by her 15-year-old biological mother, who was from a 'very poor Lahu village' with 'limited access' to medical and other services.⁵ Ms Jagelman explained in a written statement that the Lahu were 'animist, believing children with deformities or disabilities to be cursed'.⁶ This is relevant because, at the time of her birth, Ms Su had substantial brain haemorrhaging (she was diagnosed with 'neonatal intracranial haemorrhage and neonatal hypoxic-ischaemic encephalopathy') shown by three lumps on her head and she was having seizures.
16. At this time, Ms Jagelman (then known by her maiden name of Alexandra Tweedie or by her Chinese name, Su Weimin) was working as the medical director for a non-government organisation (NGO) in [redacted – name of city] city: her role was to train village doctors and maternal and child health workers. In a written statement dated 8 March 2022, Ms Jagelman described her role running a small medical clinic for children and pregnant women in a Lahu village and performing a prenatal check on a young girl who was five months pregnant and the biological mother of Ms Su. Ms Jagelman recalled in her statement that, as she was walking home from the city with her three older children on the day Ms Su was born, she was stopped by a colleague and told about Ms Su's birth. She wrote:

⁴ *CPI 23 –Determining Parent-Child Relationship for the Purpose of the Citizenship Act*, 24 May 2019, part 3.4.

⁵ Exhibit T-T3, 131.

⁶ Exhibit T-T3, 132.

The doctors at the hospital told the birth parents that the baby would “not be normal and would never speak”. My colleague was contacted and was asked by the birth family if I, as the medical director for the NGO, whom they had met at the village clinic, could confirm that the baby had problems so that “they could decapitate it”. The staff member had been to see the baby and said to me, “there are three lumps on the baby’s head.”

Still standing beside the road, the colleague shared the request by the birth parents to assess the baby and I immediately agreed to help. However, I told him “it can be very difficult to know the extent of brain damage in a newborn and if I do find that there are signs of brain damage, I would not allow them to kill the baby, I would take the baby, no matter the problem.” Upon hearing the threat to the baby’s life, I immediately decided I would raise her as my own daughter no matter the disabilities, in order to save her life. My response was relayed to the birth family by the staff member. This conversation occurred within the first couple of hours after the birth...

When I arrived at the hospital, the baby had a bulging fontanelle, a sign of intracranial haemorrhage, she was having constant seizures, and she had not been fed. The hospital’s head paediatrician performed a newborn check in front of myself and the birth parents, in which there were no normal reflexes observed. The doctors confirmed the obstructed labour and emergency caesarean and said “that there were no normal signs due to brain damage.” I spoke with the birth parents and confirmed what the paediatrician had said, that it was very likely that the baby had some brain damage although it was impossible to say what the extent would be. They [the birth parents] immediately turned around and walked out of the hospital.

The paediatrician asked if I would take responsibility for the baby. I said, “yes, I will raise the baby and be her mother.” I told her I would pay for all the medical expenses including the emergency caesarean section for the birth mother and all medical expenses. I then asked for a bottle of milk formula and proceeded to sit on the hospital bed, and successfully fed her, despite her abnormal reflexes... I gave her the name Hope...⁷

17. The evidence is very clear that Ms Jagelman then continued, in all respects, to provide care to Ms Su, pay for all her medical and other expenses, and raise her as her own child.
18. Ms Jagelman’s account of Ms Su’s birth and subsequent care is verified by other written statements including statements/statutory declarations by:

Ms Marilou Dachtler dated 30 January 2022 and Mr Norman Dachtler dated 30 January 2022, who lived in China between 1997 and 2007, and wrote about knowing Ms Jagelman, witnessing Ms Su’s ‘precarious health’ in the early weeks of her life, and the care Ms Jagelman provided to Ms Su.⁸

⁷ Exhibit T-T3, 131-132.

⁸ Exhibit T-T3, 134-135.

Ms Linda Stringer on 7 February 2022, who referred to an email Ms Jagelman sent her on 20 June 2002 that stated she had seen a paediatrician who knew Ms Su's medical history and could not 'believe a baby with such extensive brain damage could now be making normal progress.'⁹

Dr Raymond Yan Tak Wong dated 18 February 2022, who completed a medical elective at [redacted – name of hospital] public hospital in December 2001 and outlined the medical issues surrounding Ms Su's birth, Ms Jagelman taking on 'full parental responsibilities', and the medical care Ms Su required in the first weeks of her life.¹⁰

19. I consider these statements provide extremely credible and contemporaneous evidence about Ms Su's birth, her extremely poor health at and after her birth, and the care she was provided by Ms Jagelman.
20. I have also considered written statements by Ms Su, Mr Joshua Jagelman and Ms Su's older brothers, Mr Enli (Silas) Su and Mr Enci (Josiah) Su: however, I place less weight on these statements because they rely on facts that they were told about the time of Ms Su's birth.
21. I have had regard to statements and documents issued by state or public offices in China including:

Ms Su's birth certificate, which has a 'date of issue' of '[redacted – birth date]', although Ms Jagelman gave oral evidence at the hearing that it was likely she was given Ms Su's birth certificate when Ms Su was discharged from hospital several weeks after her birth. Ms Su's birth certificate includes the names that Ms Jagelman has given to her: 'Enji', 'Hope' and 'Su'.¹¹

A [redacted – name of hospital] public hospital discharge verification letter that sets out Ms Su's admission to hospital, medical diagnoses, treatment and discharge on 18 January 2002.¹²

⁹ Exhibit T-T3, 169.

¹⁰ Exhibit T-T3, 171-172.

¹¹ Exhibit T-T3, 80-81.

¹² Exhibit T-T3, 160-161.

A certificate dated 30 December 2001 written at the [redacted – name of hospital] public hospital, which refers to the circumstances of Ms Su’s birth, namely that:

she was born with ‘substantial brain haemorrhaging’ and ‘may grow up disabled or mentally retarded’;

‘without regret, the two villagers [her biological parents] decided to give the child away’; and

the ‘adopter is Su Weimin’.¹³ (Ms Jagelman said the translation of ‘adopter’ from Chinese to English could also be ‘foster’ parent or ‘care giver’, with the concept being that the person is raising and looking after the child.)

Notarial certificates issued by various state governmental public offices in China and dated 28 December 2003, 6 March 2018 and 30 August 2018 that explain the circumstances of Ms Su’s birth.¹⁴

Household register documents that are legally required under the Chinese welfare system dated 11 July 2016.¹⁵

CONSIDERATION

22. It is accepted that Ms Jagelman is, and at all relevant times, has been an Australian citizen. Therefore, the sole issue for determination is whether Ms Jagelman was the parent of Ms Su ‘at the time of the birth’ in accordance with the requirement in paragraph 16(2)(a) of the Act.
23. I have read and considered the ‘Contentions for the Applicant’ dated 31 January 2023 and the ‘Statement of Facts, Issues and Contentions of the Respondent’ dated 6 November 2023. I have also considered the oral submissions of the Applicant’s counsel and the Respondent’s counsel at the hearing in relation to the statutory interpretation of the words, ‘at the time of the birth’, and whether ‘birth’ refers specifically to a ‘physical’ or ‘medical’ moment or act, or whether ‘birth’ incorporates a ‘psycho-social’ aspect or act.

¹³ Exhibit T-T3, 156.

¹⁴ Exhibit T-T3, 154, 158, 163-164, 89.

¹⁵ Exhibit T-T3, 95-98.

24. At paragraphs 26 and 27 of the decision I made regarding Mr Enci (Josiah) Su,¹⁶ I set out relevant parts from the decision of the Full Federal Court in *H v Minister for Immigration and Citizenship (H v Minister)*,¹⁷ the leading authority on the meaning of ‘parent’ in the Act and which I also rely on in this matter. *H v Minister* sets out the following general propositions for determining when a question is one of fact, law or a mix of fact and law:

*First, the ordinary meaning of a word is a question of fact. Second, the question whether a word in the Act is to be given its ordinary meaning or some technical or other meaning is a question of law... Third, whether the facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law.*¹⁸

25. I particularly note (as I wrote at the start of paragraph 27) that:

*In considering the meaning of ‘parent’ in subsection 16(2) of the Act, H v Minister stated that ‘the more rational approach is not to attribute some technical meaning to the word “parent” in s 16(2), but instead attribute to the word its ordinary meaning as evident in ordinary contemporary English usage’.*¹⁹

26. In my decision regarding Mr Enci (Josiah) Su, I set out (at paragraphs 31-34 and at 37) the relevant findings in the decision of the Tribunal (differently constituted) regarding Ms Su’s older brother, Mr Enji (Sials) Su. I have had regard to these findings again in this matter.²⁰

27. The Respondent’s counsel made oral and written submissions regarding the Full Federal Court decision, *Koka v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Koka)*²¹ that was determined after my decision in the matter of Mr Enci (Josiah) Su. The decision in *Koka* contains the following relevant findings by their Honours:

We ‘agree ... that the legislative history of the provisions of the Citizenship Act dealing with citizenship by descent focus on the facts as at the physical birth of a person’: at [31].

¹⁶ *Su and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Citizenship)* [2021] AATA 912.

¹⁷ [2010] FCAFC 119.

¹⁸ [2010] FCAFC 119 at [45].

¹⁹ [2010] FCAFC 119 at [54].

²⁰ *Su and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Citizenship)* [2020] AATA 590.

²¹ [2021] FCAFC 82.

‘The primary judge is correct to observe ... [in] his reasons that s 16(2)(a) is not concerned with the operation of the law, or any deeming effect of adoption laws, but with the factual situation that exists at the time a child is born’: at [33].

In ‘our opinion s 16(2)(a) is ... concerned with the factual question of whether, when a child is born, she or he has – at that particular point in time – a “parent” (construed in accordance with *H*) who is an Australian citizen’: at [35].

28. I do not consider these findings by the Full Federal Court in *Koka* inconsistent with my below findings in the matter of Ms Su.

29. Based on the evidence, I am satisfied that the facts of this matter are:

Ms Jagelman did not know about Ms Su until the day she was born on [redacted – birth date], although Ms Jagelman had undertaken a prenatal check of Ms Su’s biological mother when she was five months pregnant.

On the day Ms Su was born, Mrs Jagelman was advised by a colleague that Ms Su had been born with substantial brain haemorrhaging and expected to have significant disabilities and would be killed. Ms Jagelman immediately stated she would raise Ms Su as her own child.

Ms Jagelman agreed to raise Ms Su on the day of her birth because she knew that Ms Su would otherwise die. She understood that this meant a lifetime commitment to being Ms Su’s parent.

Ms Jagelman was the first person to feed Ms Su. She was acknowledged by the [redacted – name of hospital] public hospital as Ms Su’s parent and given her birth certificate.

Ms Jagelman has since raised and cared for Ms Su as her own daughter.

30. Critically, I am satisfied these facts show the circumstances of Ms Jagelman being Ms Su’s parent *only* arose because she was born with substantial health issues and expected to have significant disabilities and, if this was not the situation, Ms Su would not have been abandoned by her biological parents.

31. Considering the policy guidance in CPI 23, I find that the sort of evidence listed to show a claimed parent-child relationship existed at or before the time of a child’s birth, is not

relevant to the factual circumstances of the birth of Ms Su. Therefore, I also weigh relevant social and/or legal factors to determine whether Ms Jagelman was the parent of Ms Su at the time of her birth.

32. Consistent with the Full Federal Court decision *H v Minister*, I accept that the meaning of 'at the time of the birth' should be given its ordinary meaning as evident in ordinary contemporary English usage, and I should not attribute some technical meaning to the word. In view of this, I simply cannot accept that 'at the time of the birth' is the precise moment in time on a particular day that a child is born. This interpretation would not allow for the various experiences of birth that occur in the ordinary sense of the word.
33. In the circumstances of Ms Jagelman and Ms Su, I find that Ms Jagelman became Ms Su's parent at the time she was born with substantial brain haemorrhaging and was expected to have significant disabilities. I accept the evidence of Ms Jagelman that a child born in the area with a physical 'defect' was either abandoned or killed at that time. I further consider that these social and cultural circumstances at the time of Ms Su's birth meant that, especially in the context of Ms Jagelman already raising two older boys she received in very similar circumstances, Ms Su would be abandoned by her biological parents when she was born with disabilities and she would be parented by Ms Jagelman.
34. It is my view that this situation reflects the unique circumstances of Ms Su and Ms Jagelman at the time of Ms Su's birth. It is also my view that this outcome is consistent with the provisions in the Act and policy guidance in CPI 23 that states that 'to make a fair, reasonable and lawful decision, it may be appropriate to depart from the approved policy and procedures, depending on the facts of the particular case'.²²

CONCLUSION

35. Weighing all the evidence, I am satisfied that Ms Jagelman was an Australian citizen at the time of Ms Su's birth and therefore, Ms Su meets the requirements in section 16 of the Act.

DECISION

36. The Tribunal:

²²CPI 23 –*Determining Parent-Child Relationship for the Purpose of the Citizenship Act*, 24 May 2019, part 1.

sets aside the decision of the delegate of the Respondent made on 5 January 2023 to refuse Ms Enji (Hope) Su's application for Australian citizenship; and
remits the matter to the Respondent for reconsideration in accordance with the direction that Ms Enji (Hope) Su's parent, Ms Alexandra Jagelman, was an Australian citizen at the time of her birth.

*I certify that the preceding 36
(thirty-six) paragraphs are a
true copy of the reasons for
the decision herein of Dr L
Bygrave, Member*

..[sgn].....

Associate

Dated: 28 November 2023

Date of hearing:	9 November 2023
Applicant:	Ms Enji Su
Counsel for the Applicant:	Ms Georgina Costello KC
Solicitors for the Applicant:	Oboodi Barristers & Solicitors Pty Ltd
Counsel for the Respondent:	Mr Jonathan Barrington
Solicitors for the Applicant:	Australian Government Solicitor

37.